

HODGES v. MULLIKIN.

BILLS OF REVIEW.—WITNESSES.

On an application for leave to file a bill of review on the ground of newly discovered matter; whether it is in truth newly discovered or not, is a question, which must be then traversed and finally determined, so as not to leave it open upon the bill of review itself. (a)

A co-defendant, as to whom a decree is not asked to be opened, or cannot be opened, is a competent witness as to any fact upon which another defendant prays to have the decree opened.

A trustee, whose liability cannot be altered by the opening of a decree, is, upon that question, a competent witness for either party.

An attorney whose client is not a party, to object or consent to his examination, cannot be permitted to speak of any facts which came to his knowledge as such.

If the new matter actually came to the knowledge of the party or might have been known to him, by reasonably active diligence, so long before the decree as to have enabled him to have had the matter put upon the record at the hearing, no bill of review will be allowed.

Although the party, applying for a re-hearing, may himself have no merits, yet if he shews, that the interests of innocent third persons, or those for whom he is trustee, may be injuriously affected, the re-hearing will be granted.

The lien of the State commences with the institution of the suit, and therefore it should be distinctly shewn.

This bill was filed on the 15th June, 1822, by Benjamin Hodges against Thomas Harwood of Ben. and Benjamin Mullikin; and it alleges, that the defendant Harwood had, by a deed bearing date * on the 7th of April, 1810, conveyed certain real and personal estate to the defendant Mullikin and Benjamin Har- **504** wood, who is since dead, and to the survivor of them, in trust for the purposes therein mentioned; and that afterwards, on the 13th of March, 1817, the defendant Harwood mortgaged the same property to the plaintiff, which mortgage debt was then due and unpaid: whereupon it was prayed, that the mortgaged property might be sold, &c. The defendants put in their answers; and, on the 2d of May, 1825, a decree was passed ordering the mortgaged estate to be sold, &c.

On the 25th of August, 1828, the defendant Mullikin filed his petition, on oath, setting forth particularly all the circumstances of his case: upon which he prayed for leave to file a bill of review, &c.

BLAND, C., 27th August, 1828.—Ordered, that the matter of the foregoing petition stand for hearing on the thirteenth day of Sep-

(a) See *Hollingsworth v. McDonald*, 2 H. & J. 230, note.